BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (per District Judge Welsh) was filed on May 17, 1940 (R. 4) and is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit (per Circuit Judge Biggs) was filed on September 11, 1941 (R. 159) and is reported in 122 F. (2d) 816, and in 1941 A. M. C. 1564. A memorandum which was filed by Judge Welsh on September 12, 1941 (not a part of this Record) is reported in 1941 A. M. C. 1569.

II. JURISDICTION OF THE COURT.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition, *ante*, at pages 3, 4.

III. STATEMENT OF THE CASE.

A statement of the case appears in the petition, *ante*, at pages 2, 3.

IV. SPECIFICATIONS OF ERROR.

(a) The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania.

(b) The Circuit Court of Appeals for the Third Circuit erred in not affirming the decision of the District Court of the United States for the Eastern District of Pennsylvania insofar as that decision held that the "Plow City" was seaworthy, that the proximate cause of the damage

was a cause within the exemptions provided by the Harter Act and the exceptions contained in the bill of lading and charter party, and that the libel should be dismissed.

(c) The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania and remanding the cause with directions merely to ascertain the damages and enter final judgment, instead of remanding the cause with directions to make findings of fact in compliance with Rule 46½.

(d) The Circuit Court of Appeals for the Third Circuit erred in not reversing the decision of the District Court of the United States for the Eastern District of Pennsylvania insofar as that decision held that the respondent is the real party in interest and entitled to bring the action.

(e) The Circuit Court of Appeals for the Third Circuit erred in reversing the decision of the District Court of the United States for the Eastern District of Pennsylvania and holding that petitioner had the burden of proving the "Plow City" was seaworthy.

V. ARGUMENT.

(a) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of the Circuit Court of Appeals for the Fifth Circuit.

In the opinion of the Circuit Court of Appeals in this case it is stated that the District Judge's finding that the "Plow City" was seaworthy was based upon nothing more than conjecture (122 F. (2d) 818). The alleged absence of proof of seaworthiness is then compared with the fact

that "there is testimony tending to prove that the thread upon the No. 1 sounding pipe and the thread of its cap were defective" (122 F. (2d) 818). The Circuit Court of Appeals, however, made no specific finding that any such defective condition ever existed.

How it was possible for the Circuit Court of Appeals to overlook all of the evidence of seaworthiness produced by the petitioner is difficult to understand. Ten witnesses, among them marine surveyors and an inspector from the United States Bureau of Marine Inspection and Navigation, gave testimony in open court in support of this point, and the depositions were taken of two others. It is obvious from the District Court's opinion that this preponderance of evidence convinced the District Judge beyond the slightest doubt that the "Plow City" was seaworthy in every respect when she sailed from Galveston. Nevertheless, having decided that the District Judge's finding was supported only by conjecture, it was a simple matter for the Circuit Court of Appeals to dispose of the merits of the case without reference to the familiar rule that the findings of the District Court, sitting in Admiralty, are entitled to great weight and should not be set aside except upon a showing that they are clearly wrong or are not supported by competent evidence: *The S. C. L. No. 9* (C. C. A. 3rd, 1940), 114 F. (2d) 964; *Johnson v. Andrus* (C. C. A. 2nd, 1941), 119 F. (2d) 287; *Eastern Tar Products Corporation et al. v. Chesapeake Oil Transport Co. et al.* (C. C. A. 4th, 1939), 101 F. (2d) 30; *The Heranger* (C. C. A. 9th, 1939), 101 F. (2d) 953.

If the finding of the District Court in this case that the "Plow City" was seaworthy is permitted to carry the weight which is properly to be accorded to it, it is at once apparent that the only way in which it was physically pos-

sible for the cap to the No. 1 sounding pipe to have become displaced was through removal by some human agency or through its working loose by reason of the straining of the vessel. The District Court so found, and following the decision of Judge Hough in *The Newport News* (D. C., S. D. N. Y., 1912), 199 Fed. 968, held that petitioner was exonerated from liability. This conclusion, however, was rejected by the Circuit Court of Appeals on the ground that "There is no evidence that any person failed to replace the missing cap", and, as stated above, because there was testimony that the cap and pipe were defective.

In contrast to the manner in which the Circuit Court of Appeals for the Third Circuit disposed of the present case is the reasoning of the Circuit Court of Appeals for the Fifth Circuit in the case of *The Point Chico* (1941), 122 F. (2d) 1. There, cargo was damaged by sea water which entered the vessel's hold in precisely the same manner as it did in this case—through a sounding pipe, the cap to which had become displaced. The District Court found that the vessel was seaworthy. It then concluded that the cap must have been removed by one of the crew who forgot to replace it.

On appeal it was argued that the District Court's finding was based upon mere conjecture. In answer to this contention the Circuit Court of Appeals for the Fifth Circuit in an opinion by Circuit Judge Foster, stated:

> "Libellants argue respondent has offered no direct evidence as to how the plug was left out and has not sustained the burden of proving that defense. Respondent was not required to do the impossible. We think the circumstantial evidence was sufficient to prove the contention. The reasonable conclusion is that the plug was left out of the sounding pipe by the negligence

of a member of the crew. In fact, every other reasonable hypothesis is excluded." (3)

The Circuit Court of Appeals therefore affirmed the decision of the lower Court.

It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Point Chico, supra.* It is further submitted, therefore, that certiorari should be granted to reverse the decision of the Circuit Court of Appeals for the Third Circuit and resolve said conflict.

(b) Certiorari Should Be Granted to Reverse the Decision of the Circuit Court of Appeals in Order to Correct That Court's Departure From the Accepted and Usual Course of Judicial Proceedings.

In *Panama Mail Steamship Company v. Vargas* (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105, the District Court entered a decree awarding damages without delivering any opinion or making findings of fact. This decree was affirmed by the Circuit Court of Appeals on the ground that "appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact or some misapplication of the law" (281 U. S. 671). This Court granted certiorari, vacated the decrees of both courts below, and remanded the cause to the District Court with directions to make specific findings of fact. Mr. Justice Van Devanter who delivered the opinion of the Court, stated:

"Formerly it was the general practice in suits in admiralty to make distinct findings on the issues of

fact; and while that practice placed an added duty on trial judges it was attended with undoubted advantages, in that it made for greater precision in the disposal of such suits in the trial courts and facilitated the presentation and consideration of appeals from decrees therein." (281 U. S. 672.)

This decision was delivered on June 2, 1930. The same day this Court promulgated Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases and it was ordered that the new Rule should become effective October 1, 1930. The Rule provides:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49." (28 U. S. C. A., following Section 723, p. 35.)

This rule was received not without some disapproval, and eventually a request was presented to Chief Justice Hughes by a committee of the Maritime Law Association that the requirements of the rule be relaxed. In Benedict on Admiralty, Sixth Edition (1941), at page 164 of the index volume, there appears this note:

> "In October, 1940, Chief Justice Hughes, replying to a request presented by a committee of the Maritime Law Association that General Admiralty Rule 46½, relating to findings of fact and conclusions of law, should be relaxed or interpreted so as to permit the decree to recite that the opinion of the District Court should be adopted and stand as the findings and conclusions, stated that such an interpretation would not

be acceptable; the Chief Justice stated that separately stated and numbered findings of fact and conclusions of law should be made a part of every record on appeal."

In the present case the District Court affirmed petitioner's requests for findings of fact "insofar as they are not at variance with the findings and discussions of facts" in the opinion. The facts are fully discussed in the opinion of the District Court. However, the Circuit Court of Appeals drew particular attention to the District Court's ruling on petitioner's requests and stated:

"Such a method of fact finding lacks clarity and coherence and does not comply with Rule 46½. Findings of fact should be clear, coherent and self-sustaining."

It must be conceded that, technically, the method of fact finding followed by the District Judge in this case was a deviation from the strict requirements of the rule. In *Interstate Circuit v. United States* (1938), 304 U. S. 55, 58 S. Ct. 768, 82 L. ed. 1146, this Court held that the opinion of a District Court is not a substitute for the findings required by Equity Rule 70½, which is similar in its provisions to Admiralty Rule 46½. Nevertheless, the assertion that the findings of the District Court in this case lack clarity or coherence is hardly warranted.

With regard to the condition of No. 1 sounding pipe and cap the District Court was requested to find as follows:

"(40) The sounding pipe leading into the afterwell or bilge cofferdam of the No. 1 hold of the Steamship 'Plow City' and the cap thereto were in good condition at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 153.)

"(42) The Steamship 'Plow City' was seaworthy with respect to the sounding pipe leading into the after-

well or bilge cofferdam of the No. 1 hold and the cap thereto, at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 154.)

In its opinion, the District Court said:

"From all of the testimony and particularly the testimony of the third mate, we are convinced that the sounding pipe and cap in question were not so defective as to render the vessel unseaworthy in that respect." (R. 8-9.)

The findings requested, therefore, were not only not at variance, but in accord, with the opinion, and it follows that they were expressly affirmed.

The District Court was further requested to find as follows:

"(33) The forward well of the No. 1 hold of the Steamship 'Plow City' and the manhole covers and gaskets thereto, were tight and in good condition at the commencement of the voyage from Galveston, Texas, on October 10, 1937. (R. 152.)

"(34) The Steamship 'Plow City' was seaworthy with respect to the forward well of the No. 1 hold, and the manhole covers and gaskets thereto at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 152.)

In its opinion, the District Court said:

"We therefore find that the 'Plow City' was seaworthy at the time of the voyage with regard to the manhole covers in the forward hold." (R. 10-11.)

Plainly these requests were also affirmed. Nevertheless, the Circuit Court of Appeals saw fit to emphasize that,

"There was also evidence that the gaskets on two manhole covers were defective" (122 F. (2d) 818).

In all petitioner submitted forty-four separate findings of fact (R. 147-154). If they are read together with the opinion it is manifest that the District Court intended to, and did, affirm all of them. The facts being thus established, the conclusion that the "Plow City" was seaworthy at the inception of the voyage followed inevitably.

Apparently the effort on the part of the District Judge to signify affirmance of petitioner's requests for finding of fact served only to nullify for the Circuit Court of Appeals the effect of the evidence which supported those requests. The opinion of the Circuit Court of Appeals points with particularity only to such testimony as happens to be contradictory to that evidence. If the District Court's method of fact finding was subject to criticism, the Circuit Court of Appeals' method of disposing of the case without attempting to review more than a portion of the record before it, or to make any findings of its own can hardly be regarded as exemplary of proper practice.

Assuming, therefore, that the District Court's opinion, together with petitioner's requests, did not constitute sufficiently clear, coherent or self-sustaining findings of fact, it was certainly not the province of the Circuit Court of Appeals to hold that the trial Judge's failure to comply with Rule 46½ required the reversal of the decision and the summary entry of judgment for the opposing party. Such procedure is tantamount to charging the litigant with responsibility for the Trial Judge's errors. Manifestly, the accepted and usual course of judicial proceeding in cases of this character, as indicated by this Court in the case of *Panama Mail Steamship Company v. Vargas, supra,*

and the contemporaneous Rule 46½, dictated that the cause be remanded to the District Court, which was the court of first instance referred to in that rule, with directions to make separately stated and numbered findings of fact. Until proper findings are made in any case it is just as impossible to render a decision in favor of one party as the other.

The criticism of the Trial Judge for the "desultory manner" in which hearings were held in this case, amounting, in the words of the opinion of the Circuit Court of Appeals, to "an abuse of judicial discretion on the part of the trial court which this court cannot overlook", introduces into the case an element which was not the basis of complaint to the appellate court. It prompted the Trial Judge to file the memorandum which is reported in 1941 A. M. C. at pages 1569-1572, and is herewith reprinted in full in the appendix to this brief. Whether or not this criticism was merited, the fact that the trial of a case by the District Court may have been attended by delays, is no justification for remanding the cause with directions to dispose of it forthwith by entering final judgment, where further proceedings by the lower court are clearly required.

It is submitted that certiorari should be granted because the Circuit Court of Appeals for the Third Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(c) Certiorari Should Be Granted in Order That This Court May Settle the Important Question Whether an Insurer Who Makes Payment Under a Loan Receipt or the Assured Is the Real Party in Interest.

As long ago as 1870 it was definitely established as a general rule in Admiralty that actions must be prosecuted in the name of the real party in interest: Benedict on Admiralty, Second Edition, § 380. This same practice has been widely adopted by rule of Court in other civil actions. The outstanding example is Rule 17 (a) of the Federal Rules of Civil Procedure, which provides:

> "Every action shall be prosecuted in the name of the real party in interest; . . ." (28 U. S. C. A. following Section 723 (c), p. 502.)

Similar rules have been adopted in a great many jurisdictions: See Moore's Federal Practice, (1938) Vol. 2, p. 2006 et seq., § 17.01.

Both the District Court and the Circuit Court of Appeals in the present case held, on the authority of *Luckenbach v. McCahan Sugar Co.,* (1918) 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170, that respondent was entitled to maintain this action in its own name, and it is true that, in the past, the Luckenbach case was universally accepted as authority for the proposition that an insurer who makes payment under a loan receipt is not a necessary party to an action against a third person to recover on account of the loss. Recently, however, that decision has been more closely examined and there has been a tendency in some cases to confine the decision to the facts in that case.

This development can be no better illustrated, perhaps, than by the case of *Scarborough v. Bartholomew, et*

al., (1940) 22 N. Y. S. 2d 635. There an automobile covered by a collision policy was damaged by the alleged negligence of a third party. Action was instituted in the name of the insured against the third party. Section 210 of the New York Civil Practice Act provides that every action must be prosecuted in the name of the real party in interest. The defendant moved to make the insurer a party on the ground that the insurer, having advanced money to the insured under an agreement to refund the same to the extent that the insured recovered from any third party, had made payment under the policy and had become subrogated to the rights of the insured (except for a $50.00 deductible). The motion was granted. The Court in discussing the Luckenbach case, stated:

> "It seems that the tendency of the Jurists in the cases cited by the plaintiff is to give weight to the statement made by Justice Brandeis in the case of Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 S. Ct. 53, 55, 63 L. Ed. 170, 1 A. L. R. 1522. Justice Brandeis, writing for the Court said: 'The carrier (a common carrier) insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. * * * ' "
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> "The above quotation from the Luckenbach case, one of the initial cases in which loan receipts made their appearance, is quoted verbatim in practically all those cases in which loan receipts are upheld and its effect upon these cases is undeniable.
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> "As stated before, the loan receipts apparently originated in a situation presented by the Luckenbach

> case, which situation is quite unlike that of the present case. In the Luckenbach case the common carrier, who was under an insurer's liability, required the shipper of the cargo to sign a bill of lading which included a provision to the effect that any insurance the shipper might have on the cargo would enure to the benefit of the carrier. The Loan receipt was devised to avoid the shifting of the loss to the insurance company from the common carrier, who should have borne the loss, because of its common law insurer's liability. It is obvious, therefore, that the Luckenbach decision was necessitated by reason of equity and substantial justice and it is quite unlikely that even Justice Brandeis would have sanctioned its extension to cases such as the present case, where the defendant is liable only in the case of his negligence. Justice Cregg, in the case of Simpson v. Hartranft, 157 Misc. 387, 283 N. Y. S. 754, 757, in referring to the holding of the Luckenbach case, recognizes the distinction in his statement: 'The equities of the case required a holding that the money advanced was a loan.' " (637-8.)

In the present case the reasons which necessitated the Luckenbach decision likewise do not exist. The "Plow City" was not a common carrier, but a private carrier liable only for negligence [*The Doyle,* (C. C. A. 3rd, 1939) 105 F. (2d) 113, 114; *The Oakley C. Curtis* (C. C. A. 2nd, 1924), 4 F. (2d) 979, 982, cert. den. 267 U. S. 599, 45 S. Ct. 354, 69 L. ed. 807; *The C. R. Sheffer,* (C. C. A. 2nd, 1918), 249 Fed. 600, 601], and there is no "benefit of insurance" clause in either the bill of lading or the charter party.

Other decisions which distinguish the Luckenbach case are *Simpson v. Hartranft,* (1935) 157 Misc. 387, 283 N. Y. S. 754, and *Yezek v. Delaware, Lackawanna & Western R. R. Co.,* (1941) 176 Misc. 553, 28 N. Y. S. 2d 34.

In view of the fact that it is the common practice of marine underwriters, and, indeed, of underwriters in gen-

eral, to make use of loan receipts in adjusting losses, it is quite important that this Court clearly decide whether or not the rule of the Luckenbach case is to be extended to cases where the exigencies which necessitated that decision do not exist. The fact that modern rules of practice, particularly the Federal Rules of Civil Procedure, require that actions be instituted in the name of the real party in interest, adds to this case a significance far greater than the mere adjudication of the rights of this petitioner and respondent.

It is submitted that certiorari should be granted to enable this Court to settle this important question of law.

(d) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of This Court.

The Circuit Court of Appeals for the Third Circuit made the following statement as to what it considered to be the law applicable to this case:

> "The question presented for our determination is a very simple one. There was a warranty by the ship owner that the Plow City was seaworthy at the beginning of the voyage. A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port. That fact must be affirmatively proven. The Edwin I. Morrison, 153 U. S. 199, 210, 14 S. Ct. 823, 38 L. Ed. 688; The Medea, 9 Cir., 179 F. 781. The owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston." (122 F (2d) 818.)

The "Plow City", however, was a private, not a common, carrier: *The Fri,* (C. C. A., 2nd, 1907); 154 Fed. 333;

The G. R. Crowe, (C. C. A., 2nd, 1923), 294 Fed. 506; *The Wildenfels,* (C. C. A., 2nd, 1908) 161 Fed. 864; *The C. R. Sheffer,* (C. C. A., 2nd, 1918) 249 Fed. 600; *The Lyra,* (C. C. A., 9th, 1919) 255 Fed. 667; *The Nordhvalen,* (D. C., D. Md., 1925) 6 F. (2nd) 883. This fact was expressly recognized by the Circuit Court of Appeals:

> "*The fact that the Plow City was a contract rather than a common carrier* is of little significance [in connection with the effect of the loan receipt] since there is no doubt that the insurer is liable upon its insurance contract." (122 F. (2nd) 819; italics supplied.)

In *Commercial Molasses Corp. v. New York T. B. Corp.,* (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125, this Court clarified the distinction between the obligations of private carriers and those of common carriers and pointed out that in the case of private carriers "the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks" (86 L. ed. Adv. Ops. 129), and that, unlike a common carrier, a private carrier does not have the burden of showing that the loss was due to an excepted cause and not to breach of the duty to furnish a seaworthy vessel.

It is submitted, therefore, that the Circuit Court of Appeals for the Third Circuit, in holding that the burden of proving that the "Plow City" was seaworthy when she left Galveston rested on petitioner, erroneously applied to a case of private carriage the rules relating to cases of common carriage. It is further submitted that the decision of the Circuit Court of Appeals should be reversed in order to resolve the conflict between that decision and the decision of this Court in the case of *Commercial Molasses Corp. v. New York T. B. Corp., supra.*

VI. CONCLUSION.

It is submitted that certiorari should be granted to reverse the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

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